No. 17-988

IN THE
Supreme Court of the United States

LAMPS PLUS, INC., LAMPS PLUS CENTENNIAL, INC., LAMPS PLUS HOLDINGS, INC.,
Petitioners,

v.

FRANK VARELA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICUS CURIAE DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS i

INDEX OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 4

ARGUMENT 7

A. Bilateral arbitration is a favored choice for many, offering economic advantages for both parties to a dispute, streamlined procedures, and speedy resolution of claims. 7

B. The Ninth Circuit decision eliminates vital benefits of bilateral arbitration that are not present in class arbitration 14

C. An arbitration clause which contracts for "arbitration" in the context of resolving individual disputes between the claimant and defendant should not be interpreted to authorize class arbitration. 22

CONCLUSION 26

INDEX OF AUTHORITIES

Page(s)

Cases

14 Penn Plaza LLC v. Pyett,
129 S.Ct. 1456 (2009) 9, 14

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995) 9, 19

Am. Express Co. v. Italian Colors Restaurant,
570 U.S. 228 (2013) 2, 5

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011) 2, 7, 14, 19

B.L. Harbert Intl, LLC v. Hercules Steel Co.,
441 F.3d 905 (11th Cir. 2006) 18

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 16

Bernal v. Burnett,
793 F.Supp.2d 1280 (D. Colo. 2011) 24

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 15

DIRECTV, Inc. v. Imburgia,
136 S.Ct. 463 (2015) 2, 22

E.g., Todd Shipyards Corp. v. Cunard Line, Ltd.,
943 F.2d 1056 (9th Cir. 1991) 21

EEOC v. Waffle House, Inc.,
534 U.S. 279 (2002) 8

Green Tree Fin. Corp. v. Bazzle,
539 U.S. 444 (2003) 18

Hall Street Assocs., L.L.C. v. Mattel, Inc.,
552 U.S. 576 (2008) 18, 21

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 17, 20

Jock v. Sterling Jewelers, Inc.,
646 F.3d 114 (2d Cir. 2011), cert. denied, 132 S.Ct. 1742 (2012) 23

La. Health Serv. Indem. Co. v. Gambro A B,
756 F. Supp. 2d 760 (W.D. La. 2010) 25

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 7

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985) 9

Oxford Health Plans LLC v. Sutter,
569 U.S. 564 (2013) 2

Phillips Petroleum Co. v. Shutts,
472 U.S. 797, 811-12 (1985) 21, 22

Puleo v. Chase Bank USA, N.A.,
605 F.3d 172 (3d Cir. 2010) 20

Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,
734 F.3d 594 (6th Cir. 2013) 24

Reed v. Fla. Metro. Univ. Inc.,
681 F.3d 630 (5th Cir. 2012) 23

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 16

Smith & Wollensky Rest. Group, Inc. v. Passow,
2011 WL 148302 (D. Mass. Jan. 18, 2011) 25

Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,
559 U.S. 662 (2010) 2, 4, 6, 7, 9, 14, 18, 23, 25

Szabo v. Bridgeport Mach., Inc.,
249 F.3d 672 (7th Cir. 2001) 20

Tumey v. Ohio,
273 U.S. 510 (1927) 17

Varela v. Lamps Plus, Inc.,
701 Fed. Appx. 670 (9th Cir. 2017) 22, 25

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.,
489 U.S. 468 (1989) 7

Yahoo! Inc. v. Iversen,
836 F.Supp.2d 1007 (N.D. Cal. 2011) 25

Court Rules

Fed. R. Civ. P. 23(f) 21

Statutes

Federal Arbitration Act (FAA), 9 U.S.C. § 1
..... 2, 5, 7, 8, 15, 18, 21, 22, 24

Other Authorities

Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair, The Kaiser Permanente System*, 70 Disp. Resol. J. 35 (2015) 11

American Arbitration Association, 2016 Annual Report, p. 8 13

Arbitration: Simpler, Cheaper and Faster Than Litigation (U.S. Chamber Institute for Legal Reform Apr. 2005) 9

Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55 (2007) 5, 17, 20

Consumer Arbitration Before the American Arbitration Association Preliminary Report 10

David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55 (2007) 19

Joshua S. Lipshutz, *Note, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration Agreements and Class Action Lawsuits*, 57 Stan. L. Rev. 1677 (2005) 10

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Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29 (1998) 10

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Roy Weinsten, et. al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, p. 3, Mirconomics Economic Research and Consulting (2017)..... 13

Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009)..... 10

Thomas H. Oehmke with Joan M. Brovins, 1 Commercial Arbitration § 16.6 (May 2018 Update)..... 26

Willging & Wheatman, *Attorney of Choice Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591 (2006)..... 17

Y2Y Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185 (1999)..... 9

STATEMENT OF INTEREST[1]

DRI – The Voice of the Defense Bar (www.dri.org) is an international membership organization composed of more than 23,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation for the role of defense lawyers in the civil justice system, anticipating and addressing substantive and procedural issues germane to defense lawyers, and achieving fairness in the civil justice system. To help foster these objectives, DRI participates as *amicus curiae* at both the petition and merits stages in carefully selected Supreme Court cases presenting questions that significantly affect civil defense attorneys, their corporate or individual clients, and the conduct of civil litigation.

Arbitration is an issue of particular interest since DRI members often advise or represent clients in drafting contracts containing arbitration clauses and in subsequent proceedings. Frequently, such contractual disputes address the enforceability of arbitration agreements. Based on the informed interest and relevant experience of its members, DRI

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have obtained consent to the filing of this amicus brief pursuant to Rule 37.

has submitted several amicus briefs in recent years in cases presenting issues under the Federal Arbitration Act (FAA). See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013); *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015).

The Ninth Circuit's opinion, which reads an agreement to participate in "arbitration" to mean an agreement to participate in class arbitration, will subject numerous defendants to the very financial risks and burdens they sought to contain by contracting for arbitration. Based on its members' extensive practical experience, DRI is uniquely well-suited to explain to the Court why class arbitration is a fundamentally different, more complex, and expensive process than individual or bilateral arbitration, and why an agreement to arbitrate should be interpreted to mean bilateral arbitration only, absent an express agreement for class arbitration.

DRI is uniquely qualified to explain to the Court why the decision below distorts generally applicable contract law, creates an insurmountable obstacle to the enforcement of tens of millions of arbitration agreements that benefit customers and businesses alike, and generally conflicts with the liberal federal policy favoring arbitration. In addition, DRI desires to explain why, in its members'

experience, class actions are fundamentally incompatible with arbitration and its benefits.

DRI and its members seek uniform application of arbitration agreements silent on the issue of class arbitration, in order to ensure that arbitration can achieve its basic purpose of resolving disputes efficiently, predictably, and at minimal cost. The Ninth Circuit's decision in this case thwarts that goal. DRI thus has a vital interest in this case.

SUMMARY OF ARGUMENT

"[C]lass arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A.*, 559 U.S. at 685. The Ninth Circuit's decision in this case essentially nullifies *Stolt-Nielsen S.A.* by concluding that ordinary arbitration-clause language, silent on the issue of class arbitration, is enough to authorize class arbitration absent a waiver. And it did so by employing a California-law rule of contractual interpretation – that ambiguities in a contract should be construed against the drafter – to create a disproportionate impact on arbitration. This is not the proper approach.

Bilateral arbitration is favored under federal law, the laws of many states, and this Court's jurisprudence, because it is inexpensive, streamlined, and efficient. Class arbitration, by contrast, is a markedly different procedure that offers none of these advantages. It is costly, risky, cumbersome, and may even involve substantial judicial oversight – the very attributes that generally motivate parties to choose traditional bilateral arbitration over litigation in the first place.

Compelling parties to resolve disputes through costly, time consuming, and high-stakes class-wide arbitration, when the parties have not agreed to do so and have merely agreed to have *their own* personal disputes resolved through arbitration (the very

definition of bilateral arbitration), frustrates the parties' intent, undermines their agreements, and erodes the benefits offered by arbitration as an alternative to litigation. Imposing class arbitration on parties who have not agreed to that procedure also conflicts with the central goal of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* to ensure that arbitration agreements are enforced strictly according to the terms adopted by the parties. *Am. Express Co.*, 570 U.S. at 233.

The Ninth Circuit's failure to properly apply this Court's precedents subjects Petitioners, and will subject countless other defendants, to complex, high-stakes, class arbitration procedures to which they never agreed. That result is incompatible with the principle that contractual agreement is the cornerstone on which the arbitration system rests. Under such a regime, with "millions of dollars and perhaps the company's future at risk," and absent "the safeguards litigation provides[,] the consequences of an unreviewable arbitral error are so great that arbitration is no longer a viable option." Clancy & Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 71-74 (2007) (citations omitted). The experience of DRI members confirms that these risks are real.

The Ninth Circuit incorrectly imposed class-wide arbitration based solely on a clause in an individual contract that – without saying a word about class arbitration – merely required the parties to arbitrate all disputes. This decision is contrary to

this Court's guidance, particularly in *Stolt-Nielsen S.A.*, that an arbitrator may not order class-wide arbitration when an arbitration agreement is "silent" on the issue of class arbitration. If allowed to stand, the Ninth Circuit's decision will adversely affect the judicial system and the rule of law by subjecting parties to expensive, protracted proceedings to which they never agreed when contracting for arbitration. The Ninth Circuit's decision should be reversed.

ARGUMENT

A. Bilateral arbitration is a favored choice for many, offering economic advantages for both parties to a dispute, streamlined procedures, and speedy resolution of claims.

The FAA, enacted nearly a century ago in response to "widespread judicial hostility to arbitration agreements[,]" reflects both a "'liberal federal policy favoring arbitration'" and the "'fundamental principle that arbitration is a matter of contract.'" *Concepcion*, 563 U.S. at 339. Under the FAA, parties may agree "to arbitrate according to specific rules" and courts must enforce those agreements "according to their terms." *Id.* at 344. The FAA thus ensures not only that arbitration agreements are enforceable, but also that hostility to arbitration is not permitted to transform arbitration by replicating the most expensive and formal aspects of judicial proceedings. *Stolt-Nielsen S.A.*, 559 U.S. at 682; *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

The cornerstone of arbitration is that it "is a matter of consent, not coercion." *Volt*, 489 U.S. 479. This is particularly important in the class arbitration context. In *Stolt-Nielsen S.A.*, this Court explained that the absence of specific language barring class arbitration is not sufficient to show consent:

> [A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so...The critical point, in the view of the arbitration panel, was that petitioners did not establish that the parties to the charter agreements intended to *preclude* class arbitration...[T]he panel regarded the agreement's silence on the question of class arbitration as dispositive. The panel's conclusion is fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.

559 U.S. at 684 (emphasis in original; internal quotations and citations omitted). Accordingly, parties may structure their arbitration agreements as they see fit, specify the governing rules, and specify *with whom* they choose to arbitrate their disputes. *Id.* at 683, citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) ("[N]othing in the [FAA] authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement" (emphasis added)).

These ground rules for arbitration are important. Arbitration agreements are commonplace in every corner of the economy, and the benefits of bilateral arbitration have been recognized by this Court, arbitration participants, and skeptics alike. Bilateral arbitration gives consumers "a less expensive alternative to litigation." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280-281

(1995); *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1456, 1464 (2009) (same); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985) (same). Streamlined procedures minimize the "delays, expense, uncertainties, loss of control, * * * and animosities that frequently accompany litigation." Y2Y Act, Pub. L. No. 106-37, §§ 2(a)(3)(B)(iv), 2(b)(3), 113 Stat. 185, 186-187 (1999) (encouraging businesses and users of technology to use "alternative dispute mechanisms" to avoid "costly and time-consuming litigation").

Bilateral arbitration is also hailed for the procedural and administrative benefits it offers. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." *Stolt-Nielsen S.A.*, *supra*, at 685. This is just one of the reasons consumer satisfaction with bilateral arbitration is high. See, e.g., A Harris Interactive Survey, *Arbitration: Simpler, Cheaper and Faster Than Litigation* (U.S. Chamber Institute for Legal Reform Apr. 2005) (detailing high satisfaction with arbitration results and process, including speed and simplicity).

Empirical data confirm that consumers often "fare better in arbitration, both in terms of the likelihood of success on the merits and the size of the award, than in litigation." Joshua S. Lipshutz, *Note, The Court's Implicit Roadmap: Charting the Prudent Course at the Juncture of Mandatory Arbitration*

Agreements and Class Action Lawsuits, 57 Stan. L. Rev. 1677, 1712 (2005). Even two decades ago, one study showed that employees collectively received 10.4% of their demand in litigation, compared with 18% in arbitration. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 48, 63 (1998). This trend has continued to hold true over time. The Searle Civil Justice Institute preliminary report released on consumer arbitrations administered by the American Arbitration Association (AAA) revealed that consumers won some relief in 53.3% of the cases filed and recovered an average of $19,255 (52.1% of the amount claimed). See Consumer Arbitration Before the American Arbitration Association Preliminary Report, available at http://www.searlearbitration.org/report.

A second study by Searle, this time involving debt collection, showed that "[c]reditors prevailed less often (that is, consumers prevailed more often) in the arbitrations studied than in court...even after controlling for differences among the types of cases and the venue in which they were brought" and that "[c]reditor recovery rates in the arbitrations studied were lower than, or comparable to, creditor recovery rates in court...[e]ven after controlling for differences among the cases." Searle Institute, *Creditor Claims in Arbitration and in Court Interim Report No. 1, Executive Summary* (Nov. 2009) (emphasis eliminated), available at http://www.law.northwestern.edu/searlecenter/uploads/CREDITOR%20CLAIMS%20IN%20ARBITRATIO

N%20AND20IN%20COURT%20INTERIM%20REPORT%20N0.%201.pdf.

Even self-described "arbitration skeptics" concede the benefits bilateral arbitration affords. In a recent study, legal scholar Alan B. Morrison examined in depth the mandatory arbitration system used by the self-insured umbrella health maintenance organization Kaiser Foundation Health Plan, Inc., which operates the Kaiser Permanente medical delivery system for seven-plus million members. Alan B. Morrison, *Can Mandatory Arbitration of Medical Malpractice Claims Be Fair, The Kaiser Permanente System*, 70 Disp. Resol. J. 35 (2015). Nearly every California Kaiser member is required to sign, as part of joining the program, an agreement to arbitrate all medical malpractice claims under the Kaiser Permanente system. In 2013, the program received 657 demands for arbitration. *Id.* at 36.

Morrison concluded that the Kaiser Permanente arbitration system can result in very equitable relief to individuals who are genuinely injured, and in a much more cost-effective and speedy way than traditional litigation. The filing fee to make a claim under the Kaiser arbitration system is $150, compared to $400 (or more) for federal and California court filing fees. *Id.* at 46. Additional savings to claimants resulted from Kaiser Permanente's payment of the full cost of the arbitrator's fee in 90% of the cases in 2013. *Id.* at 47. The rules of the Kaiser Permanente Board require that all cases be completed – and awards rendered – within 18

months of filing (absent limited exception). *Id.* at 49. In 2013, the average completion time was 11 months for all cases, and 60% were resolved in less than one year. *Id.* When compared with the average time of 43 months between occurrence of an incident and resolution of the claim in the court system (in this particular study, 39.7% of the cases were from California), "it is clear that claims brought by Kaiser patients are resolved through arbitration much more rapidly than they would be in court." *Id.* at 50.

Morrison's positive evaluation of the Kaiser Permanente arbitration system revealed a high degree of user satisfaction, both from lawyers for the parties, arbitrators, and claimants. *Id.* at 52-53. The reality that "no claimant who does not have counsel can hope to survive long enough to reach trial" due to "the many rules applicable to medical malpractice cases in the California courts" is not true with Kaiser Permanente's arbitration system. *Id.* at 56. In 2013, 26% of the claimants were without counsel, and five claimants without counsel went to trial within the arbitration system that year. *Id.* at 56-57.

The Kaiser Permanente arbitration system is just one example of a bilateral arbitration system working to produce just results in an efficient manner. The American Arbitration Association, commissioning a study, "Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings" in 2016, confirmed that "[o]n average, U.S. District Court cases took more than 12 months longer to get to trial than cases using arbitration." American

Arbitration Association, 2016 Annual Report, p. 8, available at https://www.adr.org/sites/default/files/document_repository/AAA_AnnualReport_2017.pdf. And these "delays to adjudication are not without cost." Roy Weinsten, et. al., *Efficiency and Economic Benefits of Dispute Resolution through Arbitration Compared with U.S. District Court Proceedings*, p. 3, Mirconomics Economic Research and Consulting (2017). The trickledown effect of delays in resolving disputes is well-illustrated in this example:

> A dispute between a supplier and purchaser in which the supplier claims the purchaser owes $1 million leaves both supplier and purchaser uncertain as to which party will retain the funds after the dispute has been adjudicated. The purchaser cannot comfortably invest the $1 million to hire new employees since it may be required to pay the supplier once the dispute has been adjudicated. Likewise, the supplier cannot use the funds to purchase new equipment because it may never receive the money. Both parties are thus constrained; the funds are unavailable to either; both parties experience a loss until the dispute is resolved. *Id.*, pp. 3-4.

Quantitatively, "direct losses associated with *additional time to trial* required for district court cases compared with AAA arbitration are approximately **$10.9 - $13.6 billion** between 2015 and

2016 (i.e. more than **$180 million per month**)." *Id.*, p 4 (emphasis in original).

The fact "that arbitration procedures are more streamlined than federal litigation is *not* a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration." *14 Penn Plaza LLC v Pyett*, 556 U.S. 247, 269 (2009) (emphasis added); *Concepcion*, 563 U.S. at 348 (observing "informality" as "the principal advantage of arbitration"). DRI's members expect that bilateral arbitration will continue to be a favored way for their clients to efficiently and effectively resolve their disputes. In fact, many of DRI members' clients utilize arbitration clauses in their warranties to not only provide remedies to injured persons, but also to foster a good reputation in their respective industries. However, if bilateral arbitration clauses are interpreted to authorize class arbitration, as the Ninth Circuit held, the benefits of arbitration will be lost. Defendants, in turn, will be forced to revert to traditional litigation proceedings to resolve disputes. This is inefficient for all.

B. The Ninth Circuit decision eliminates vital benefits of bilateral arbitration that are not present in class arbitration.

The advantages of traditional, bilateral arbitration just described do not exist in class arbitration. Class arbitration is by its very nature protracted, complex, and expensive. As this Court recognized in *Stolt-Nielsen S.A.*, class-wide

procedures are inherently incompatible with the traditional advantages and essential features of arbitration. The Ninth Circuit's insistence on class-wide arbitral procedures even where an arbitration agreement is silent on class arbitration destroys the benefits of traditional arbitration and is but another effort to "chip away at [the FAA] by indirection." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122 (2001).

The delay inherent in class arbitration is in stark contrast to the speed and efficiency of individual consumer arbitration. In short, class arbitration offers none of the advantages of traditional arbitration - e.g., its speed, low cost, and streamlined proceedings - that both Congress and this Court have recognized are helpful to business and consumers alike.

Class arbitration lacks the safeguards and judicial oversight that are indispensible to class litigation. The judicial oversight that accompanies class-action litigation also guarantees certain protections that benefit both plaintiffs and defendants. Defendants benefit from procedural mechanisms that end meritless litigation before discovery or trial and ensure a hearing before a judge with no financial incentive to certify a class. Both sides benefit from full appellate review at all critical stages of the litigation. Finally, class members benefit from judicial protection of their due-process rights, which also provides defendants with assurance that absent class members will be bound

by the result. None of these protections is assured in class arbitration, and some are nonexistent.

This Court has imposed pleading standards in class actions designed to ensure that meritless cases are dismissed at an early stage before a defendant is subjected to expensive and protracted discovery. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) ("District courts must be especially alert to identify frivolous [class actions] brought to extort nuisance settlements...."). Motions to dismiss and motions for summary judgment are thus common methods for disposing of legally and factually deficient lawsuits short of trial. In class arbitration, however, dispositive motions are disfavored; indeed, "[s]ummary judgment in AAA arbitration is so rare as to be statistically insignificant." Lewis L. Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105, 113 (2003). In individual arbitration, this procedural limitation is widely accepted as part and parcel of arbitration's informality and streamlined proceedings. In class arbitration, however, the likely unavailability of early dispositive motions exposes defendants to the expense of discovery and even a merits hearing on meritless claims. *Cf. Twombly*, 550 U.S. at 559 ("the threat of discovery expense will push cost-conscious defendants to settle even anemic cases").

In addition, class arbitration creates the special problem that arbitrators have powerful financial incentives to certify a class. Put simply, arbitrators, who are compensated based on the

amount of time they devote to a case, stand to earn far more if they allow a class arbitration to proceed than if they do not. Clancy & Stein, *supra*, at 73-74. As this Court has recognized, a party "might ... with reason" fear a judge who "has a direct, personal, substantial pecuniary interest in reaching a conclusion against him." *Tumey v. Ohio*, 273 U.S. 510, 523, 533 (1927).

Reinforcing this concern, the AAA's statistics indicate that arbitrators are in fact more likely to certify a class than either federal or state judges. Arbitrators granted 24 of the first 42 contested class-certification motions filed under the AAA Rules - a grant rate of 57.14%. See AAA *Stolt-Nielsen* Brief at 22. In contrast, in a Federal Judicial Center study on the impact of CAFA, federal judges granted only 18 of 62 contested class-certification motions - a rate of only 29.03%. Willging & Wheatman, *Attorney of Choice Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 634-35 (2006). In the same study, state judges granted 12 of 27 contested motions - a rate of 44.44%. Thus, AAA arbitrators appear nearly *twice* as likely to grant class certification as federal judges, and significantly more likely to certify a class than even state court judges - the very judges whose "[a]buses" provoked CAFA's enactment (CAFA §2(a)(4)). In light of such incentives and evidence, most if not all defendants will choose federal courts, where they "have no reason to suppose that [the district judge] wants to preside over an unwieldy class action" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995)), over arbitration.

The extremely narrow scope of judicial review of arbitrators' class-certification decisions and final awards on the merits also poses intolerable risks for defendants. As this Court recently held, section 10 of the FAA lists the "exclusive" grounds for vacating an award, all of which "address egregious departures from the parties' agreed-upon arbitration" or "extreme arbitral conduct." *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Courts may not engage in "legal review generally." *Id.* In the context of individual arbitration, this limitation is necessary "to maintain arbitration's essential virtue of resolving disputes straightaway." *Id.* at 588. "If ... parties who lose in arbitration [could] freely re-litigate their cases in court, ... dispute resolution [would] be slower instead of faster[,] and reaching a final decision [would] cost more instead of less." *B.L. Harbert Intl, LLC v. Hercules Steel Co.*, 441 F.3d 905, 907 (11th Cir. 2006).

In a class arbitration, however, the vastly increased stakes coupled with narrow judicial review amplify the cost of arbitrator error to an unacceptable level. As Justice Scalia put the problem: "You might not want to put your company's entire future in the hands of one arbitrator." Oral Argument Tr., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003), available at http://www.oyez.org/cases/2000-2009/2002/2002_02_634/argument; see also *Stolt-Nielsen S.A.*, 130 S.Ct. at 1776 ("[T]he commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope

of judicial review is much more limited."). No rational business will do so willingly. *Concepcion*, 563 U.S. at 351 ("when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.").

The cost savings of individual arbitration do not translate to class arbitration. Indeed, given that it entails substantial arbitrators' fees that have "no equivalent in a traditional, judicial class action," class arbitration may prove more expensive than its judicial counterpart. David S. Clancy & Matthew M.K. Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 Bus. Law. 55, 64 (2007). At minimum, it is clear that, unlike individual arbitration, it is *not* a "less expensive alternate to litigation." *Allied-Bruce*, 513 U.S. at 280.

Empirical data on class arbitration confirm that the procedure is just as cumbersome as a judicial class action, if not more so. AAA statistics show that "the median time frame from filing [a AAA class arbitration] to settlement, withdrawal, or dismissal – not judgment on the merits – was 583 days, and the mean was 630 days." *Concepcion*, 563 U.S. at 349. While 19-21 months might be a reasonable period in which to resolve the merits of a class dispute, that is not what these statistics reflect. Rather, 85% of the cases included in the average were terminated, i.e., settled, withdrawn, or dismissed, *before any ruling on class certification* – and *none* "resulted in a final award on the merits."

AAA *Stolt-Nielsen* Brief at 23. Thus, like its court-administered counterpart, a class arbitration is likely to take years to complete.

Even in court, a class-action defendant faced with such significant potential liability is "under intense pressure to settle" (*In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1298-1299), "even if the [plaintiffs'] position is weak" on the merits (*Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001)). In class arbitration, the lack of meaningful review - both at the class certification stage and on the merits - intensifies this pressure and exacerbates the problem of "blackmail settlements." Indeed, a prominent plaintiffs' attorney speaking at an American Trial Lawyers Association convention touted that "decision[s] by the arbitrator with respect to class certification and an ultimate award are virtually non-appealable" as "a feature which terrifies corporate defendants." Clancy & Stein, *supra*, at 71; *cf. Puleo v. Chase Bank USA, N.A.*, 605 F.3d 172 (3d Cir. 2010) (en banc) (rejecting plaintiffs' argument that the enforceability of a class waiver should be determined by the arbitrator, not the court).

In an apparent attempt to address one aspect of this problem, the AAA authorizes the parties to pursue interlocutory judicial review of arbitrators' class-certification decisions, describing the opportunity as "akin to ... interlocutory appellate review of district court class certification decisions." AAA *Stolt-Nielsen* Brief at 19. This comparison is inapt because the arbitrator's decision is reviewable

only on the narrow grounds specified in 9 U.S.C. § 10; more searching review "akin to" federal appellate review under Fed. R. Civ. P. 23(f) appears to be foreclosed by *Hall Street*. Thus, the review contemplated by the AAA rules remains an inadequate safeguard.

Finally, it remains uncertain whether class arbitration is capable of protecting class members' due process rights and producing legally binding results. Most courts have held that due-process protections do not apply to private arbitration because the parties "voluntarily" consent to the arbitral process. *E.g., Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1063-64 (9th Cir. 1991). How this reasoning applies to class arbitration remains unclear. For example, do absent class members "voluntarily" consent to a class arbitration, even if they never receive actual notice of its pendency? If not, will an arbitration that fails to "provide minimal procedural due process protection" bind absent class members? *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Are arbitrators even capable of providing such protections? See generally, e.g., Maureen A. Weston, *Universes Colliding: The Constitutional Implications of Arbitral Class Actions*, 47 Wm. & Mary L. Rev. 1711 (2006) (concluding that, without significant ongoing judicial supervision, arbitrators are not capable of providing such protections).

As this Court has recognized, whether a class-action defendant "wins or loses on the merits, [it] has a distinct and personal interest in seeing the entire

plaintiff class bound by [the judgment] just as [it] is bound." *Shutts*, 472 U.S. at 805. No rational defendant will agree voluntarily to a procedure that involves all the same risks and potential liability of a class action without the concomitant assurance that the result will bind absent class members. But left intact by this Court, the Ninth Circuit's decision – which authorizes class arbitration even absent express agreement – forces defendants into this exact predicament.

C. An arbitration clause which contracts for "arbitration" in the context of resolving individual disputes between the claimant and defendant should not be interpreted to authorize class arbitration.

Using California contract interpretation principles, the Ninth Circuit concluded that an arbitration agreement in which Respondent agreed to arbitrate "any right...relating to *my employment* with the Company" authorized class arbitration. *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670, 672 (9th Cir. 2017) (emphasis added). In this way, the Ninth Circuit's decision bears a striking resemblance to the California Court of Appeal's decision in *DIRECTV, Inc. v. Imburgia*, 136 S.Ct. 463 (2015), in which the court of appeal purported to apply California contract interpretation principles in a gerrymandered way to ensure that arbitration as envisioned under the FAA cannot take place. In both cases, the courts used the canon that ambiguities should be construed against the drafter to impose class arbitration. In *Imburgia*, this Court struck

down the court of appeal's decision, finding that its interpretation of the arbitration clause was "pre-empted" by the FAA. *Id.* at 471. This Court recognized that "the reach of the canon construing contract language against the drafter must have limits, no matter who the drafter was." *Id.* at 470.

A like result is warranted here. An arbitrator may not infer an implicit agreement to authorize class-action arbitration from the absence of an explicit agreement to *preclude* class arbitration. *Stolt-Nielsen S.A.*, 559 U.S. at 684-685. The Ninth Circuit relied heavily on the contract's language that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" to support the arbitrator's finding of assent to class arbitration. 701 Fed. Appx. at 672. But most arbitration agreements that are "silent" on class arbitration contain similar language. See, e.g., *Stolt-Nielsen S.A.*, *supra*, at 667; *Reed v. Fla. Metro. Univ. Inc.*, 681 F.3d 630, 642-43 (5th Cir. 2012); *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 114, 116 (2d Cir. 2011), cert. denied, 132 S.Ct. 1742 (2012). And these courts did not interpret such arbitration clauses to authorize class arbitration.

As the Fifth Circuit correctly noted in substantially similar circumstances, reliance on the "any dispute" language of an arbitration agreement to find assent to class arbitration effectively nullifies *Stolt-Nielsen S.A.*. *Reed*, 681 F.3d at 643 (a "class arbitration award based upon an 'any dispute' clause would be insufficient under Stolt-Nielsen [because] a general arbitration clause, according to the *Stolt-Nielsen S.A.* Court, does not authorize class

arbitration because class arbitration differs too much from individual arbitration") (quotation and citation omitted); *accord Bernal v. Burnett*, 793 F.Supp.2d 1280, 1287-88 (D. Colo. 2011).

The Sixth Circuit has reached the same conclusion. *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett*, 734 F.3d 594 (6th Cir. 2013). Rejecting the argument that the arbitration clause providing for arbitration "'arising from or in connection with *this Order*', as opposed to other customers' orders[,]" authorized class arbitration, the *Reed Elsevier* Court concluded that "[t]he principal reason to conclude that this arbitration clause does not authorize class-wide arbitration is that the clause nowhere mentions it." *Id.* at 599. Even though the agreement "does not expressly exclude the possibility of class-wide arbitration...the agreement does not include it either, which is what the agreement needs to do in order for us to force that momentous consequence upon the parties here." *Id.*

Under the Ninth Circuit's approach, even where the agreement contains no provision reflecting express assent to class arbitration, arbitrators and courts can use a contractual canon to [illegible]eat the ordinary understanding of arbitration – which is bilateral arbitration – and force that "momentous consequence" upon Petitioners. If affirmed, the Ninth Circuit's decision will encourage other courts to impose class arbitration on parties that never agreed to it – elevating a policy preference for the class-action device over the FAA's "basic precept that arbitration is a matter of consent, not coercion."

Stolt-Nielsen S.A., 559 U.S. at 681 (quotation marks omitted). The result is a "palpable evasion" of *Stolt-Nielsen S.A. Varela*, 701 Fed. Appx. at 673 (Fernandez, J., dissenting).

The experience of DRI members bears out this concern. Subsequent to *Stolt-Nielsen S.A.*, many arbitrators and courts limited this Court's holding to the context of a stipulated "no agreement" to class arbitration. *Stolt-Nielsen S.A.*, *supra*, at 687, n. 10 ("[w]e have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration."). Some have conjured up justifications for class arbitration in contracts that fall far short of affirmative "consent to resolve...disputes in class proceedings." *Stolt-Nielsen S.A.*, *supra*, at 686-687.[2] This Court should close the pathway that allows such end-runs around its decisions.

Because the relative benefits of class arbitration are much less assured, one should not interpret a contract's silence or ambiguity on class arbitration, as the Ninth Circuit found here, as justification to force unwilling parties to arbitrate in a fashion contrary to their original expectations. Thomas H. Oehmke with Joan M. Brovins, 1

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[2] See, e.g., *Yahoo! Inc. v. Iversen*, 836 F.Supp.2d 1007, 1012-13 (N.D. Cal. 2011); *Smith & Wollensky Rest. Group, Inc. v. Passow*, 2011 WL 148302, at *1 (D. Mass. Jan. 18, 2011); *La. Health Serv. Indem. Co. v. Gambro A B*, 756 F. Supp. 2d 760, 762 (W.D. La. 2010).

Commercial Arbitration § 16.6 (May 2018 Update). In light of the marked differences between bilateral and class arbitration – differences that are far "too great" for a presumption that "arbitration" means "class arbitration" – this Court should add the last piece of the puzzle and conclude that an agreement to arbitrate, absent express language authorizing class arbitration, is an agreement authorizing individual, bilateral arbitration *only*.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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